IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-1091

J. B. ROSE, FLORENCE ROSE and BROWNIE-ROSE CANDIES, INC.,

Petitioners

versus

CITY OF LOS ANGELES, a Municipal Corporation, C. ERWIN PIPER, Individually and as City Administrative Officer of the City of Los Angeles, CHARLES LUCKMAN and ASSOCIATES, a corporation, CHARLES LUCKMAN and SAM BURNETT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioners, J. B. Rose, Florence Rose and Brownie-Rose Candies, Inc. respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of California entered in the above entitled case on October 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, Second District, State of California is unreported and is included as Appendix A to this Petition. The Order of the Supreme Court of the State of California, denying Certiorari, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, Second Appellate District, State of California sought to be reviewed was filed on August 20, 1976. The Order of the Supreme Court of the State of California denying the Petition for a Writ of Certiorari was entered on October 21, 1976.

QUESTIONS PRESENTED

1. Where there has been a course of conduct amounting to fraudulent misrepresentation, concealment, perjury and studied imposition on the court, which course of conduct was neither discovered nor discoverable until after such conduct resulted in a final judgment, can the doctrines of collateral estoppel or res judicata defeat a cause of action seeking damages resulting from such conduct.

2. Should an evidentiary hearing be granted where there is probable cause to believe that a miscarriage of justice would result from application of the doctrines of res judicata or collateral estoppel.

3. Are the petitioner entitled to maintain an action to recover on behalf of the state, funds which have been illegally misused by a local entity.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> "No person shall ... be deprived of property, without due process of law; Nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

In May of 1968, the City of Los Angeles filed a Condemnation Action in the Los Angeles Superior Court to condemn certain properties belonging to these Petitioners, known herein as Parcels 115AA, 115R, 116AA and 116R. The A Parcels were to be acquired for street widening purposes and the R Parcels were to be acquired for "reservations". During the course of that Condemnation case, the public use for the R Parcels was contested. It was during the course of that special proceeding concerning whether there was a public use for the R Parcels that the City effectively denied these Petitioners their day in Court. The record filed in the Court of Appeals reveals that a subpoena was issued for certain documents and records of the City of Los Angeles. That subpoena was quashed on the ground that the requested documents and materials were too voluminous and burdensome for the City to produce.

It is those same books, records and documents which comprise three and one-half of the five volumes of the Record on Appeal. After an adverse decision in

that Condemnation Case, and after a Final Judgment therein, Petitioners finally were able to obtain the information which they sought at the time of the hearing on the question of public use. Those documents reveal that it is distinctly possible that a quite different result would have been obtained had the trial court been apprised of the contents of those documents. In essence, those documents reveal the course of conduct by and between the City and the Luckman defendants to acquire the Petitioners' private properties not for any public use, but instead for a private development for gain by CHARLES LUCKMAN AND ASSOCIATES.

Thus armed with the facts to present to a Court, the Petitioners filed this action in the Los Angeles Superior Court for the purpose of setting aside the Judgment in Condemnation as to the "R" Parcels.

After given several opportunities to amend their Complaint, the Petitioners below suffered the sustaining of a general demurrer without leave to amend. Among other documents presented to the Court below, the time that the Court was considering the Demurrers filed by the Respondents herein, was a Motion to conduct an Evidentiary Hearing to determine whether the doctrines of res judicata or collateral estoppel should be applied under the circumstances in the case at bench.

The Trial Court denied the Motion.

The Court of Appeals' Opinion expressly recognized the propriety of the Motion for Evidentiary Hearing in its Decision, but failed in its Decision

to set forth any appropriate guidelines for the grant or denial of such a Motion. This Court is requested to grant this Petition for Hearing for the essential purpose of discussing whether, based upon the facts presented herein, the Motion for an Evidentiary Hearing should have been granted.

REASONS FOR GRANTING WRIT

I

THE AUTHORITIES ARE UNANIMOUS THAT EXCESS CONDEMNATION IS UNCONSTITUTIONAL

In researching the various areas of the law it is rare indeed to come upon a point on which the authorities are as uniformly in agreement as on the subject of excess condemnation. Such authorities hold that excess condemnation is unconstitutional when the taking exceeds in quantity the property to be actually put to a public use. 68 ALR 837 states the principle as follows:

> "There seems to be no difference of opinion among the cases on the question as to the right, in the exercise of the power of eminent domain, to condemn land in excess of needs for public uses. The authorities seem to be uniform that such power cannot be exercised for such purposes. As stated in the original annotation, 1/ even the legislature cannot authorize the taking of property inexcess of that required

1/ Referring to 14 ALR 1350.

for the public use, such excess to be sold or devoted to private use."

An earlier annotation, in 14 ALR 1350, states the principle as follows:

> "It is a general principle that the legislature cannot authorize the taking of property in excess of that required for the public use, such excess to be sold or devoted to privated use. (citations)"

Both of the above ALR annotations cite a prodigious number of cases, from many states in which attempts at condemning excess land under various theories have been struck down by the state courts. It is precisely such uniformity with which state courts have dealt with excess condemnation in the past that accounts for the paucity of recent decisions on the subject.

Nichols on Eminent Domain, Vol. 2, §7.31(1), p. 673, states the above point as follows:

> "As the courts of the several states have not as a rule attempted to stretch the powers of their respective legislatures in taking property by eminent domain to an unreasonable limit, and as the Supreme Court of the United States has not encouraged appeals to its jurisdiction over such proceedings by showing any tendency to interfere except in the most flagrant cases, suits involving the constitutionality of state statutes which rest for their

> justification upon the customary constitutional provision relating to eminent domain are not very frequently brought before the Supreme Court of the United States."

The practice of excess condemnation has been so uniformly struck down by state courts that the subject has been considered settled for many years. It is noteworthy that LAR, after making excess condemnation the subject of two annotations (14 ALR 1350 and 68 ALR 837) has not found it necessary to devote any further space to this subject in the entire ALR 2n series of annotations.

It has been held from the first impression that taking in excess of a public use in unconstitutional. Opinion of Justices (1910) 204 Mass. 607, 91 NE 405; Salisbury Land & Improvement Co. v. Commonwealth (1913) 215 Mass., 102 NE 619, 622; Curtis v. City of Boston (1924) 247 Mass. 417, 142 NE 95; Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 Pa. 47, 88 Atl. 904, 907; Jennings v. State Highway Comm. (1922) 183 NC 68, 110 SE 583, 584; Wilton v. St. John's County (Fla) (1929) 123 So. 527; Young v. Gurdon (1925) 169 Ark. 399, 275 SW 890, 894.

Also see the New York line of cases In re Albany Street (1934) 11 Wend (NY) 148; Embury v. Conner (1850) 3 NY 511; Hopper v. Britt (1911) 203 NY 144, 149; Onondaga Water Service Corp. v. Crown Mills, Inc. (1928) 132 Misc. (NY) 848, 855; 230 NY Supp. 691; In re City of Rochester (1929) 237 NY Supp. 147. This line of authorities is still followed in New York. 19 NY Jurisprudence, Eminent Domain, §62, p. 260.

Likewise, Seattle v. Fausett (1923) 212 p. 1085; Kessler v. Indianapolis (1927) (Ind.) 157 NE 547; Richmond v. Carneal (1921) 106 SE 403, 14 ALR 1341; Roanoke v. Berkowitz, 80 VA. 616, 622; Winger v. Aires (1952) 371 Pa. 242, 89 Atl. 2d 521, 522; Burton v. Ward (1951) 218 Ark. 253, 236 SW 2d 65.

Over the years, some courts have allowed very limited excess taking of very small pieces of land. But courts in so holding have made it clear that the excess land must be very small in size, and the excess must be of direct benefit to the public improvement, and thus itself a public use.

The Massachusetts Supreme Court, after holding that such taking of lot remnants "goes to the very verge of constitutionality" said:

> "While it is plain that a city or town cannot take land outside a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the question before us."

Opinion of Justices (1910) 204 Mass. 616, 91 NE 578, 580.

The courts which have accepted the above view have uniformly limited excess taking to very small remnants adjoining and directly benefitting the public improvement. Philadelphia B. & W. R. Co. v. Baltimore (1913) 121 MD. 504, 88 Atl. 263; Excelsior Needle Co. v. Springfield (1915) 221 Mass. 34, 108 NE 497; Clendaniel v. Conrad (1912) (Del) 83 Atl. 1036, 1047; Baxter v. City of Louisville (1928) (Ky.) 6 SW 2d 1074; Opinion of the Justices (1953) (Mass.) 113 NE 2d 452, 467-468.

Also see 5 Michigan Law and Practice Encyclopedia, Condemnation, §20, p. 428.

The principle of unconstitutionality of eacess taking also finds support among eminent domain writers of note:

> "The taking of private property beyond that which is required for the particular use named in the petition is a violation of constitutional limitations."

Jahr on Eminent Domain, §203, p. 324.

". . .we think that the constitution impliedly forbids the taking for public use of what is not necessary for such use and, therefore, though the constitution and statute are silent on the subject of necessity, that the power to take is, in every case, limited to such and so much property as is necessary for the public use in question, and that the owner is entitled, either in the proceedings to condemn or otherwise, to be heard upon this question." Lewis on Eminent Domain, Vol. 2, §600, pp. 1060-1061.

Also see 18 Calif. LR 284, 3 Southern Calif. LR 121, 15 Columbia LR, 306 (note 18), 2/ 29 Columbia LR 1151, 10 RCL 41, 4 U. Cin. LR 94, 474.

In the face of such uniform holdings of the authorities that statutes authorizing excess condemnation are unconstitutional, a number of states have adopted state constitutional amendments allowing condemnation of small remnants. In California such amendment is found in Article 1, § 14 1/2 of the California Constitution.

The decision of the U.S. Supreme Court in Cincinnati v. Vester 281 US 439, 74 L.Ed. 950, affirming the express holding of the U.S. Court of Appeals, 33 F.2d 242, that excess condemnation is a violation of the due process clause of the 14th Amendment to the U.S. Constitution, settled the question of excess condemnation in a definitive manner. The Vester case was cited with approval by the Supreme Court in 1959 in Allegheny County v. Frank Mashuda Co. 360 US 186, 3 L. Ed. 2d 1163.

It is therefore uniformly accepted law that excess condemnation - except possibly for taking of small remnants - is unconstitutional as a taking

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2/ It is noteworthy that excess condemnation has also been held unconstitutional in Switzerland which has a federal constitutional government like the United States. Entscheidungen des Schweizerischen Bundesgericht. Vol. 31, (1905) Part 1. p. 645. Cited in 15 Columbia LR 306, supra.

of property for a non-public use in violation of the 5th Amendment and as a taking of property without due process of law under the 14th Amendment.

II

NO THEORY OF EXCESS CONDEMNATION IS APPLICABLE TO THE CASE AT BAR.

Over the years the proponents of excess condemnation have evolved several theories attempting to justify eminent domain taking beyond a contemplated public improvement. In this connection three theories have been advanced.

The first of these is the so-called "remnant theory." i.e. when the taking is a partial one, leaving behind a small sliver or remnant of a lot which is left in such a size, shape or condition as to be effectively useless to the owner, then the condemnor may take such remnant although the remnant will not be used as part of the public improvement.

The second theory is the "protective theory," i.e. a small amount of land in excess of the public improvement is taken to provide lateral support for a street, or in some other way directly benefit the public improvement.

The third theory is the so-called "recoupment theory" which is a euphemism for the state taking land in excess of the public improvement and then reselling to private persons thereby speculating in land, hoping for a profit.

These three theories have been considered by the authorities and writers at length. Cincinnati v.

Vester, supra 33 F.2d 242, affirmed 281 US 439, 74 L.Ed. 950; 14 ALR 1350; 18 CLR 284; 3 SCLR 121; 29 Columbia LR 1151; 10 RCL 41; Cushman, Excess Condemnation.

The courts have had ample opportunity to pass on the constitutionality of the three theories suggested above. [3] Of the three theories only the "remnant theory" and the "protective theory" have won even a small measure of approval after a judicial scrutiny for constitutionality, on the grounds that the "excess" under the above two theories benefited the public improvement and thus was in itself a public use. In any event, the excess land taken must be very small in size and of no practical use to the owner.

The third theory, the "recoupment theory," has consistently received short shrift from the authorities. Salisbury Land & Improvement Co. v. Commonwealth (1913) 215 Mass. 371, 102 NE 619; Cincinnati v. Vester, supra, 33 F.2d 242; 14 ALR 1350; 18 CLR 284, 287. Even Robert E. Cushman, a proponent of excess condemnation, states in his book Excess Condemnation, at p. 310, drawing his final conclusions as to the constitutionality of excess condemnation:

[3] Property owners' diligent search discloses no additional theories seriously propounded as constitutional. It would appear that untilthe case at bench no condemnor has had the temerity to suggest to the courts that it can take as much land as it pleases without any particular public use for the excess, the excess land to be merely hoarded or sold at the condemnor's pleasure.

> "If the only motive for the application of that scheme (excess condemnation) was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law."

Applying the above theories of excess condemnation to the case at bench it is readily seen that neither of the two theories which have just barely survived the test of constitutionality, i.e. "remnant theory" and "Protective theory," is applicable here. Surely, the condemnor hasn't suggested seriously that a parcel of land of some 14,000 square feet, five times as much as the land actually to be used for the condemnor's street, is a mere insignificant remnant of no use to the owner and incapable of utilization by the owner.

Nor can the condemnor argue the "protective theory." Even today the land is naught but a weed-ridden, trash attractive eyesore.

Thus, the conclusion is inescapable. The condemnor took five times as much land as it will actually use for its street and its protection for reasons which can charitably be described as an arbitrary exercise of state power. However, in view of the condemnor's communications with the architect

and developers and lies to the property owner, it must be concluded that the condemnor's motives were more sinister than mere arbitrariness.

We usually tend to think of government as a positive force. To borrow the expression of Mr. Justice Brandeis, 4/ government is the omnipresent teacher of our society. But if the government be permitted to engage in such dirty business, then what of the citizens who look to the government to set an example?

Such behavior on the part of the state, the administrator and enforcer of laws, can only lead to contempt for the law and disrespect of the administration of justice. Therefore, property owners respectfully submit that there is more at stake here than the outcome of one case. This court will not only uphold the constitution by granting property owners the relief sought, but also provide a bulwark against future disregard of constitutional limits by state officials.

III

PRESUMPTIONS ARE NOT A MEANS TO ESCAPE CONSTITUTIONAL RESTRICTIONS.

The test for whether a constitutional right is violated is found in the facts of the individual case, not the abstract words of the statute. Yick Wo v. Hopkins, 118 US 356, 30 L.Ed. 220.

4/ In his landmark dissent in Olmstead v. U.S., 277 US 438, 478, 72 L.Ed. 944, 956.

As applied to property owners at bench, CCP § 1241(2) as here applied permits the taking of their property for other than a public use. Thus the right to own private property recognized by the 14th Amendment and fundamental to our system of government and economics is violated if condemnor can take all of the subject property under the cloak of a presumption arising from the condemnor blandly resolving they will use some 16,000 square feet when they only intend to use 2700 square feet.

Thus, there is another matter that warrants comment herein. Assuming arguendo that the mere utterance of the words "for reservation purposes" by the condemnor's resolution in contravention of truth, is sufficient to establish a public use, does that mean that the question of necessity is forever foreclosed no matter what the circumstances? Must the courts stand by and impotently watch a violation of the Constitution under a sham declaration that the use is a public one?

These questions were answered by the United States Supreme Court in Chicago B. & Q. R. Co. v. Chicago (1896) 166 US 226, 41 L.Ed. 979, 984:

> "Can a state make anything due process of law which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states if of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. [1] (quoting from) Davidson v. New Orleans, 96 US 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings

inconsistent with the requirement of due process of law."

In his authoritative work on eminent domain, Nichols has this to say about the non-justiciability of necessity (p. 377):

> "There is, however, at lease a theoretical limit beyond which the legislature cannot go. The expediency of constructing a particular public improvement and the extent of the public necessity therefore are clearly not judicial questions; but it is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. So, also, the due process clause protects the individual from spoliation under the guise of legislative enactment, and while it gives the courts no authority to review the acts of the legislature and decide upon the necessity of particular takings, it would protect an individual who was deprived o his property under the pretense of eminent domain in ostensible behalf of a public enterprise for which it could not be used. While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements, it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter

> disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but felt that the body had acted with total lack of judgment or in bad faith. In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. But while the courts have frequently declared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen.
> "It being settled that, while necessity is not primarily a judicial question, there may be such absolute lack of necessity as to render the proceeding void, it necessarily follows that an owner who alleges such lack of necessity is entitled to have the question passed upon by a judicial tribunal. It is however, generally held that the question of necessity need not be determinable in the condemnation proceedings themselves, since the legislative assertion of necessity is primarily conclusive, and that the constitutional rights of the owner, to be protected against a taking without possibility of necessity are sufficiently guarded by his right to institute proceedings at law or in equity to save his property and have the taking set aside; . . ."

Thus, property owners submit all state actions are subject to judicial review so that

it may be determined whether such state actions are repugnant to the federal constitution. Chicago B. & Q. R. Co. v. Chicago, supra, 166 US 226, 234; Scott v. McNeal, 154 US 34, 38; Southern R. Co. v. Virginia (1933) 290 US 190, 78 L.Ed. 250; NAACP v. Alabama (1958) 357 US 449, 2 L.Ed. 2d 1488.

Therefore, the act of a city council which passes an ordinance of necessity cannot somehow become an act of a superstate, immune to judicial scrutiny under the due process clause. Can it be fairly said that a city ordinance of necessity to condemn is clothed with the armor of a conclusive presumption of necessity, where the declaration itself is sham and in patent contradiction to the truth? Property owners submit that the answer is in the negative. As was said by the Supreme Court, in a different factual context, in New York Times Co. v. Sullivan, 11 L.Ed.2d 686, 709:

> "The power to create presumptions is not a means of escaping from constitutional restrictions."

IV

NEITHER OF THE DOCTRINES OF RES JUDICATA NOR COLLATERAL ESTOPPEL ARE APPLICABE TO THE CASE AT BENCH

The defense of res judicata and collateral estoppel are not applicable to the case at bench for a number of reasons:

1. There is no final judgment in favor of the demurring defendants nor is ther any privity between the demurring defendants and the parties in the former

condemnation proceeding:

2. There is no "identy of issues;" and

3. The doctrines may not be invoked to perpetrate or compound a patent miscarriage of justice.

The developer respondents were not parties nor were they in privity with the parties to the former condemnation action. One of the criteria which is absolutely necessary before either the doctrine of res judicata or collateral estoppel may be invoked as an absolute bar is that the parties to the "New" suit must be identical to or in privity with the parties to the former suit.

The rule in California is that in considering the doctrine of res judicata, either as a bar or as a collateral estoppel, there must be an identity of the parties to the action before the defenses may be applicable. In Great Western Furniture Co. v. Porter Corp. (1965) 238 Cal.App. 2d 502, 508-509, the Court restated the rule as follows:

> "Whether the doctrine or res judicata is considered in its primary aspect as a merger or bar, or in its secondary aspect as a collateral estoppel (see Panos v. Great Western Packing Co. (1943) 21 Cal. 2d 636, 637-638 (134 P. 2d 242); Dillard v. McKnight (1949) 34 Cal. 2d 209, 214 (209P. 2d 387, 11 A. L. R. 2d 835); McDougall v. Palo Alto Etc. School Dist. (1963) 212 Cal.App. 2d 422, 428 (28 Cal. Rptr. 37); Saunders v. New Capital for Small Business, Inc. (1964) 231 Cal. App. 2d 324, 330 (41 Cal. Rptr. 703)), the general

rule is that there must be an identity of the parties to the actions before the doctrine can become operative. (Code Civ. Proc., §§ 1908, 1910; Rest., Judgments, §§ 68, 79; 3Witkins, Cal. Procedure (1954) p. 1955; see Standard Oil Co. v. J. P. Mills Organization (1935) 3 Cal. 2d 128, 139 (43 P. 2d 797).) Code of Civil Procedure section 1910 provides: 'The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joinded with both or either.'

"In spplying the doctrine of res judicata, the law is clear that 'Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action.' (1 Freeman on Judgments (5th ed. 1952) § 422, p. 918; Victor Oil Co. v. Drum (1920) 184 Cal. 226, 239 (193 P. 243); Standard Oil Co. v. J. P. Mills Organization, supra, 3 Cal. 2d 128, 139-141; Rest., Judgments §82; Code Civ. Proc., § 1910.)"

N. B. The Porter case, supra, was decided after Bernhard v. Bank of America (1942) 19 Cal. 2d 807. Professor Brainerd Currie, after a sometimes penetrating and sometimes convoluted analysis of the Bernhard case suggests that a proper interpretation of Bernhard would deny the use of the defense in the case at Bar. See 9 Stanford Law Review 281 at 304:

"The foregoing discussion supports the proposition that the defendant in the later action should have the plea against a claimant who was also plaintiff in the prior action. This is the narrow holding of the Bernhard case. But more generally, the discussion supports two negative propositions:
(a) One not a party to the prior action should not be allowed to invoke the former judgment against one who was defendant in the prior action, since, not having been incontrol of the time and place of the action, the party against whom the plea is asserted may not in fact have had a realistic opportunity to make a full and effective defense.
(b) The language of the indemnity cases indicates that the plaintiff in the later action who was not party to the prior action, should never be allowed to invoke the former judgment offensively against the defendant in the later action."

And at p. 307:

"These cases lead ineluctably to the conclusion that there is no reason, except to avoid anomaly in the indemnitor-indemnitee relationship, to distinguish the case in which the plea is asserted by the defendat from that in which it is asserted by the plaintiff, and that it is only in a jurisdiction which, like California, has emancipated itself from the mutuality rule that the question becomes important whether the party against whom the plea is asserted had the initiative in the prior action or not." (Footnote omitted.)

2. There Is No Identity of Issues.

The gravamen of the Petitioners' cause of action is that as a consequence of the fraud practiced by the demurring Respondents, that is the perjury and concealment of the true facts, the Petitioners were effectively denied their day in Court. The issue in the condemnation action was whether the City of Los Angeles was acquiring the Petitioners' property for a public use.

The issue in the case at bench is whether the demurring Respondents, by lying about some facts and concealing others, are responsible for any damage which those acts might have proximately caused.

This action, by way of analogy is much like a legal malpractice action where one is entitled to prove that but for the wrongful act of a third party the result would have been different. In such cases the Plaintiff is always the losing party in the former action. In such cases the Plaintiff must prove that but for the wrongful act of a third party, not a party to the former action, that the result would have been different.

The case at bench is essentially the same. The Petitioners are the "losing party" in the former condemnation action. They allege that but for the intentional wrongs perpetrated by the demurring Respondents they were in fact precluded from fully exploring the "public use" issue in the former trial and that had they not lied the result would have been different.

Any rule which would allow the doctrine of res judicata to apply in these circumstances would not just shield those who are intentional wrongdoers but provide them with an incentive to be proficient in their criminality.

Whether the issue in a new action is the same as the one previously adjudicated has been the subject of prolific litigation.

Some guidelines have emerged and are restated in Witkins Calif. Proc. 2nd Ed. V. 4P. 3336-3337:

> "(1) Where, as is usual, more than one issue was involved, the burden of proof is on the party asserting the defense of collateral estoppel to show that this issue was adjudicated. (See Horton v. Goodenough (1920) 184 C. 451, 460, 194 P. 34; Emerson v. Yosemite Gold Min. etc. Co. (1906) 149 Ca. 50, 57, 85 P. 122; Quinn v. Litten (1957) 148 C.A. 2d 631, 633, 307 P. 2d 90 (no collateral estoppel where issue previously litigated was not identical); Weak v. Weak (1962) 202 C.A. 2d 632, 634, 21 C.R. 9, citing the text (issues not the same); Solari v. Atlas-Universal Service (1963) 215 C.A. 2d 587, 599, 30 C.R. 407; Saunders v. New Capital, etc. (1964) 231 C.A. 2d 324, 330, 333, 41 C.R. 703 citing the text; Carey v. Cusack (1966) 245 C.A. 2d 57, 68, 54 C.R. 244, citing the text; Frazier v. Wasserman (1968) 263 C.A. 2d 120, 125, 69 C.R. 510, infra, § 234; Timmsen v. Forest E. Olson (1970) 6 C.A. 3d 860, 870, 86 C.R. 359; Eichler Homes v. Anderson (1970) 9 C.A. 3d 224, 234, 87 C.R. 893; Rest., Judgments §68, Comment 1; 46 AmJur. 2d 763;

James, p. 579; infra, 22199 et seq., 209 et seq.) "In Braslow v. Kelley (1957) 151 C.A. 2d Supp. 852, 855, 312 P.2d 432, an action on a contract allegedly made by an agent, the prior judgment for defendants, rendered without findings, could have been based either on the determination (a) that the agent did not make the contract at all, or (b) that he did but lacked authority to bind the principal. Held, the present suit against the agent for breach of warranty of authority was not concluded because the first judgment could have been based on the second defense."

The apparent tendency, as revealed by the above cases, is to find that the issues which are being compared for identity are not the same where there is any reasonable dissimilarity.

3. The Doctrine Will Not Be Applied Where Its Invocation Would Result in Injustice.

See Restatement of Judgments § 70.

This portion of the rule with respect to the appropriate application of the doctrine of res judicata is of prime significance in the case at bar.

The allegations of the Complaint, which must be deemed true for purposes of this demurrer, essentially charge the demurring Respondents with the commission of perjury for their own profit.

Cochran v. Union Lumber Co. (1972) 26 Cal. App. 3d 423 is analogous to the case at bench because it has the "third party" situation. In Cochran

there was no question but that the issue was identical to one previously litigated.

However, the Court said that the prior litigation, although final, was clearly erroneous, and to apply the rule of collateral estoppel would result in a patent injustice. The court said at p. 42:

> "A discussion of these questions, although obviously germane to the facts of this case, is not necessary; for such would be merely supportive and ancillary to our conclusion that the issue of collateral estoppel in the case at bench is governed by the overriding policy of law which prohibits application of the doctrine whenever injustice would result. (Emphasis added.)
>
> "This important qualification of the doctrine is set forth in section 70 of the Restatement of Judgments which reads as follows: 'Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result.' (pp. 318-319; italics added.)
>
> "Comment f to this section explains that the determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action

arose out of the same subject matter or transaction, if it would be unjust to one of the parties to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons. The conclusion and reasoning of the Restatement find support in United States v. Stone & Downer Co. (1927) 274 U.S. 225, 235-237 (71 L.Ed. 1013, 1026-1028, 47 S.Ct. 616) and are cited with approval in a number of California cases (see Louis Stores Inc. v. Department of Alcholic Beverage Control (1962) 57 Cal.2d 749, 757 (22 Cal. Rptr. 14, 371 P. 2d 758); United States Fire Ins. Co. v. Johansen (1969) 270 Cal.App. 2d 824, 834-835 (76 Cal.Rptr. 174, 780); Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board (1965) 236 Cal.App. 2d 325 333-334 (45 Cal. Rptr. 892; Thain v. City of Palo Alto (1962) 207 Cal.App.2d 173, 185 (24 Cal. Rptr. 515)).

"Applying the above principles to the instant case, we initially point out that the lower court's decision in Urban v. Union Lumber Co., supra, was clearly erroneous. The decision in Urban resulted from the misapplication of Gibbs v. Peterson (1912) 163 Cal. 758 (127 P. 62). Gibbs dealt with a conveyance of timber which was expressly to be removed within 10 years. The court in Gibbs held that since the instrument provided for removal of the timber within 10 years, the payment of the yearly rental of $200 did not give plaintiff an absolute right to perpetually maintain such timber on the land (p. 766). Therefore, it is apparent that the application of Gibbs to Urban where the deed itself accorded a right

of perpetual removal to defendant, was an error.

"In view of the facts and principles set forth above, it is indisputable that the instant case is based upon a different cause of action, and that repeated application of the previous wrong decision would result in manifest injustice. This would necessarily follow because the conclusiveness of the Urban decision would be limited to merely cases where Union is a party, but would have no applicability at all where a similar or even identical question would be litigated between other lumber companies and third persons, in which event Union would obviously suffer a competitive disadvantage with respect to other companies in the industry who would remain to litigate the issue; and, in the light of our holding reached in the case at bench, they would be entitled to a favorable decision. (In support of the principle here expressed, see also: United States v. Stone & Downer Co. : Louis Stores, Inc. v. Department of Alcoholic Beverage Control; Thain v. City of Palo Alto; Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board, all supra.) We conclude, therefore, that the trial court was not collaterally estopped to decide the issue of time for removal of timber in the present case."

The applicability of the doctrine of collateral estoppel was expressly rejected in Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal.App. 3d 860.

In Timmsen plaintiff sued a real estate broker alleging, inter alia, that his behaviour in propelling the

the plaintiff into a contract for the sale of real estate was less than candid and adverse to his interests. The plaintiff had previously been the losing defendant in a prior action brought by the purchaser for specific performance of the contract. The court said:

> "The issues determined by Burrow v. Timmsen were that as between the sellers (plaintiffs herein) and the purchaser(Burrow) the contract was certain, just and reasonable, the consideration was adequate, the assent of the parties was not obtained by misrepresentation, concealment, circumvention or unfair practices, the assent of the parties was not given under the influence of mistake, misapprehension or surprise; that there was no adequate remedy at law, and that the contract was capable of specific enforcement. (Civ. Code, §§ 3390, 3391; 4 Witkin, Summary of Cal. Law (1960) Equity, §17 et seq.) As already noted, the brokers, (defendants herein) were not parties to that lawsuit.
>
> "The issues and parties in the instant case are different from those in Burrow v. Timmsen. Here there is no attack made on the validity and enforceability of the sale agreement; those were the issues determined by Burrow v. Timmsen. The issues presented by this action are whether the agents were guilty of withholding from their principals material facts, whether the agents assumed a position adverse to their principals, and if so, whether the principals suffered any damages as a proximate result thereof.

> Since the issues are not identical the doctrine of collateral estoppel is not applicable. (Teitelbaum, supra, 58 Cal. 2d 601, 604).
>
> "Notwithstanding this conclusion we note that even if the requirements for the application of the doctrine of collateral estoppel are present, 'in cases where a grave injustice would otherwise result, there has been a tendency to depart from the general rule.' (United States Fire Ins. Co. v. Johansen, 270 Cal. App. 2d 824, 834 (76 Cal. Rptr. 174, 780) (hg. den.); see also Rest., Judgments § 70.) To apply the doctrine of collateral estoppel in the instant case, even if all requirements were present, would countenance an injustice." (Emphasis added.) The most recent expression of California law on the subject is found in Pentz v. Kuppinger (1973) 31 Cal. App. 3d 590. That was an action to recover assertedly excessive amounts collected by a defendant under a Mexican judgment which was in turn based upon an earlier judgment in a California court.

The defendant obtained a Writ of Execution from the Los Angeles court. She started an action against the plaintiff in Mexico to enforce payments due her under the writ.

In the Mexican action she demanded amounts in excess of the California Writ. The Plaintiff in the Pentz case appeared in the Mexican proceeding, attacked the jurisdiction of the court, and denied the allegations set forth in the complaint.

From a Mexican court judgment in favor of the defendant the Plaintiff appealed, which judgment was affirmed. The defendant then executed on the Mexican judgment. The plaintiff then sued the defendant claiming unjust enrichment. The complaint alleged, inter alia, that the defendant failed to disclose to the Mexican court that she had received payments on account of the Writ and failed to credit such payments on the amounts due.

The court found that the plaintiff was denied the opportunity to acquaint the Mexican court of the already received payments and that the concealment of such facts constituted extrinsic fraud. Pentz is a "non-fiduciary" case. The Pentz decision relied upon a 1933 California Supreme Court case entitled Caldwell v. Taylor (1933) 218 Cal. 1271. In the Caldwell case the court laid down two very significant rules:

1. "A proceeding for equitable relief is not a collateral attack and since its sole aim and purpose is to avoid the effect of such judgment, the doctrine of res judicata can have no application to said judgment." Caldwell at p 475.

2. "The main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting all of his case to the court. One One of the examples given is that of a party who is prevented from appearing in court. It would seem that the deceit practiced in the instant case was just as effective to prevent the proper presentation of a contest as if the plaintiff had been prevented from being present at the hearing." (Emphasis by the court.)

If the demurring Respondents are permitted to assert the doctrine of collateral estoppel under the circumstances in this case, not only will they have profited once from their chicanery, but the court deals them an additional ace for being successful perjurers.

Such an anamolous result should not be permitted where there are overriding policies of law in which the public has a vital interest.

In any event, the question of whether collateral estoppel is a complete defense should not be decided as a matter of law on a demurrer. As in Ford Motor Motor Co. v. Superior Court (1971) 16 Cal. App. 3d 442, 448-449.

> "In this case, a trial court should determine, after a full evidentiary hearing, whether requirements for the doctrine of collateral estoppel are present, and if so, whether the application of the doctrine of collateral estoppel, even if all the requirements are present, would contenance an injustice."

V

THE INFIDELITY OF THE GOVERNMENT IN THE CONDEMNATION CASE DEPRIVED THE PETITIONERS OF DUE PROCESS OF LAW, WHICH DEPRIVATION CAN BE RECTIFIED BY A COLLATERAL ATTACK.

The Petitioners have alleged that there was active suppression of evidence that would have been beneficial to them in the condemnation case.

It was further alleged that had such information become known to the Court and to these Petitioners that the deception would not have succeeded.

For the purposes of this case, those allegations must be accepted as stating the truth.

Where there is a relationship between the government and its citizens where circumstances require full disclosure, failure to make full disclosure to the prejudice of the citizen's results in a denial of due process of law. It should be noted at the outset that the law of eminent domain as it is applied to a condemnee's rights is always subject to the scrutiny of compliance with the Fifth and Fourteenth Amendments of the Constitution of the United States.

Thus, where a state law falls short of affording the minimum protections required by the Fifth and Fourteenth Amendments of the Constitution of the United States, actions taken pursuant to such state law are unconstitutional. See Mooney v. Holohan (1935) 294 U.S. 103, 79 L.Ed. 791, and People Ex Rel Department of Public Works v. Lynbar, Inc. (1967) 253 Cal. App. 2d 870, at 880, where the Court said:

> "Just compensation under the Fifth Amendment to the United States Constitution, so far as taking damages are concerned, means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken from him. (United States v. Miller, 317 U.S. 369, 373 87 L.Ed. 2d 336, 342 63 Supreme Court 276, 147 ALR 55] 1.) We believe that the due process

> clause of the Fourteenth Amendment to the United States Constitution requires this as well."

Thus, obtaining a judgment based upon testimony known to the Government to be perjured is a denial of due process. Most of the cases dealing with that subject arise by way of a collateral attack on a final criminal conviction. However, there is no legitimate distinction between criminal conviction obtained by a denial of due process and a judgment in condemnation obtained by the same means. If indeed a distinction need be made, the condemnee who stands accused of no wrongdoing in a condemnation case should be afforded, at the very least, the same protections as do those persons where there is presumably probable cause to believe they may have committed a crime.

The rule which has emerged may be stated as follows: The due process of law which is protected from State and Federal infringement by the Fourteenth and Fifth Amendments is denied by a judgment following a trial in which perjured testimony on a material point is knowingly used and where it appears that the person against whom the judgment has been taken suffered prejudice by reason of the use of such testimony.

In Mooney v. Holohan (1935) 294 U.S. 103, 79 L.Ed. 791, the United States Supreme Court declared that the requirements of due process of law are not met by notice and hearing on an issue if the government has contribed a judgment by a pretense of a trial, which is in truth used as a means of depriving a defendant of liberty by deliberate deception of the court and jury by the presentation of testimony known to be perjured.

One needs only to substitute the word "property" for the word "liberty" and it becomes evident that the Mooney case in and of itself is dispositive of the demurrer that was before the Court. Mooney came up by way of a Writ of Habeas Corpus after the judgment in the California Court became final.

Further, in Alcorta v. Texas (1957) 355 U.S. 28, 2 L.Ed 2d 9, the petitioner, on a Writ of Habeas Corpus, was convicted of the murder of his wife. The jury rejected his contention that the homicide came within the scope of certain Texas statutes which treat a killing under sudden passion as murder without malice. During the course of the trial, the petitioner's claim was that the killing occurred in a fit of passion when he discovered his wife under compromising circumstances. At the trial, the party with whom the petitioner said she had been with denied that he had known the petitioner's wife any more than casually.

Sometime later, and after the petitioner's conviction, the reputed wife's lover declared that he had given false testimony at the trial. He also said that he had informed the prosecutor before the trial, who had advised him not to volunteer any such information.

The United States Supreme Court set aside the judgment of the Texas Courts even though such state courts' judgments were final.

In another case along the same lines, Hysler v. Florida (1942) 315 U.S. 411, 86 L.Ed. 932, Justice Frankfurter said that where a government obtains a judgment through the use of perjured testimony, "It violates civilized standards for the trial of guilt or innocence," and thereby deprives an accused of liberty without due process of law.

In addition to the cases heretofore cited to the Court with respect to the duties of the government's attorney there can be added the following California cases:

In People v. Stuart (1969) 272 Cal.App. 2d 653, at 655-656 was a prosecution for receipt of stolen goods. In order to prove specific intent the prosecution sought to justify an inference of such intent by evidence of flight from the arresting officer.

Both the defense counsel and the prosecution knew that the flight from the arresting officer was by reason of a suspected assault. On appeal the court held:

> "Examination of the whole record compels our conclusion that distortion was deliberate. The fact that defense counsel knew that evidence was being withheld and did not object to use in the interest of justice. Even our assumption of the additional possibility that defense counsel may have withheld objection for tactical purposes could not affect the ultimate result. The reason: a criminal action was presented to a trier of fact upon partial evidence which, by reason of the false inferences created, became firm evidence. A case so tried is an unfair trial which denys the accused due process. We cannot accept the postulation that a trier of fact might have deemed the true evidence more inculpatory than the false. A trial upon false evidence is no trial at all."

In People v. Kiihoa (1960) Cal. 2d 748, the court had before it the following facts: a suspected felon was arrested, detained for more than two days, and subsequently released. He was released because prosecution could have required the disclosure of an informant's identity.

Thereafter the informant left the jurisdiction. The defendant was rearrested and convicted. The District Attorney asserted that he had no duty to produce the informant. In discussing the duties of the government attorney the court quoted from People v. Sheffield, at 108 Cal. App. 2d, 721, 732, as follows:

> "It is the duty of the District Attorney not to obtain convictions, but to fully and thoroughly present to the court the evidence material to the charge upon which the defendant stands on trial and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented and the Constitutional guarantees of the defendant are neither violated nor infringed."

In a case where a defendant stands accused of nothing more than being a property owner in the path of a so-called public improvement the quotation above becomes much more poignant.

In Brady vs. State of Maryland (1963) 373 U.S. 85; 83 Supreme Court 1194, the court extended the Mooney v. Hoolihan Rule and said:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

It would be well to reiterate the specific language of the United States Supreme Court in the Mooney case:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

Whether the official is a government attorney, or a policemant, or some other elected or appointed official having undertaken all of the obligations of a public trust by reason of public office, the result of a breach of that trust in an unfair trial deprives the beneficiaries of that trust of the due process of law to which they are entitled under the Fifth Amendment of the Constitution of the United States. In a criminal case the appropriate vehicle to correct such a denial of due process is a Writ of Habeas Corpus.

In a civil case the appropriate vehicle to correct such a denial of due process is an attack such as the Petitioners have mounted by their Complaint in this action.

Similarly, in California it has been held that the concealment of evidence in a civil case vitiates a judgment which might otherwise have a collateral estoppel effect.

Pentz v. Kuppinger (1973) 31 Cal. App. 3d was such an action.

It should be noted that the Pentz case is a "non-fiduciary" case and the ruling where there is a fiduciary

relationship is much more liberal than in the non-fiduciary cases.

The Court hardly needs reminding that the conduct of a governmental agency towar its citizens, particularly in a condemnation case, is that of a fiduciary. The often misused phrase "public office is a sacred trust" is not an empty shibboleth.

Pentz relied upon, inter alia, the case of Stenderup v. Broadway State Bank (1933) 219 Cal. 593. In that case, the situation is extraordinarily similar to the case at bench in that in the Stenderup case was a prior action for an accounting was instituted and a final judgment therein rendered. After the judgment became final, the plaintiff learned that certain notes, which had been turned over to him as uncollected, had in fact been wholly paid.

It was alleged that the testimony given by the officers of the bank in the accounting action was false and fraudulent and that it did those things for the fraudulent purpose of deceiving the Court and the plaintiff in the accounting suit.

The Court said,

> "If this conducts was, as alleged, for the fraudulent purpose of preventing information as to the status of these notes from reaching plaintiff, and to deceive them and the Court, it was conduct extrinsic and collateral to the issue made by the pleadings and authorized relief in equity under the rule relating to extraneous fraud, recently discussed, and perhaps extended, by this Court in the case of Caldwell v. Taylor (citation)." Stenderup at 596-597.

In Ford Motor Company v. Superior Court (1971) 16 Cal. App. 3d 442, 448-449, the court held that:

> "In this case, a trial court should determine, after a full evidentiary hearing, whether the requirements for the doctrine of collateral estoppel are present, and if so, whether the application of the doctrine of collateral estoppel even if all the requirements are present, would countenance an injustice."

It is hard to imagine a much clearer direction to trial courts when confronted with the question of whether or not the requirements for the doctrine of collateral estoppel are present, and even if they are, whether the facts would prevent the application of that doctrine. That direction leads ineluctably to the conclusion that this matter of collateral estoppel should not be decided by a hearing on a demurrer.

VI

THE "PUBLIC USE-PUBLIC NECESSITY" CONUNDRUM

The parties agree that it is important to distinguish between the concepts of "public use" and "public necessity" and that they have frequently been the source of confusion. To go on to say, as the respondents suggested below, that recent opinions have clarified the distinction is surely too much freight for so slight a vehicle as People v. Chevalier (1959) 52 Cal. 2d 299.

Since the Chevalier case, there has been litigation resulting in direct challenges to the issue of public necessity by reason of environmental incompatibility. See McIntire, "Necessity" in Condemnation Cases--Who Speaks for The People?" 22 Hastings Law Journal 561 (1971)

In People Ex Rel Department of Public Works v. Superior Court (1968) 68 Cal. 2d 206 the government needed slightly more than a half acre for the use which it contemplated, and sought to take 54.03 acres which it did not need, could not use and whose avowed purpose was to speculate on re-sale to a private purchaser.

During the course of working its ultimate injustice upon the property owner, the Court illustrates that the twin concepts of public use and public necessity are so interrelated that distinctions between them become more semantic than real. For instance, in that excess condemnation case, the Court said, at page 216:

> "When, as in this case, the property is not needed for the physical construction of the public improvement, the question of public use turns on a determination of whether the taking is justified to avoid excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is not so justified, it might find that it is not for public use,"

and all that means is that if the Court finds that such excess condemnation is not justified under an allowable theory, then the question of whether or not there has been a public necessity is irrelevant. The legislative determination of public necessity is a hollow declaration where there is no public use.

The characterization of the result was accurately put by Mr. Justice Mosk at page 216 as follows:

> "Whenever an illustration of the voracious appetite of acquisitive government is desired, the action of the public agency here will serve well as Exhibit A."

Moreover, to suggest that collateral estoppel applies to an issue which is expressly made non-justiciable in a condemnation case is to defy logic.

If indeed the issue that was tried in the condemnation case was the issue of public use, then the question which this Court must answer is not whether that issue was tried and is therefore res judicata, but whether the Complaint alleges that the Petitioners were prevented, by the fraud of the Respondents, from fully trying that issue. That requires an evidentiary hearing as directed by the Ford case, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD I. GLASER
RICHARD M. KARCESKI
IRWIN M. FRIEDMAN

APPENDIX

A

Opinion of the Court of Appeal, Second Appellate District, State of California

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

J. B. ROSE, FLORENCE ROSE and BROWNIE-ROSE CANDIES, INC.,	)	2nd Civ. No. 46596
Plaintiffs and Appellants,	)	
vs.	)	
CITY OF LOS ANGELES, a Municipal corporation, C. ERWIN PIPER, individually and as City Administrative Officer of the City of Los Angeles, CHARLES LUCKMAN AND ASSOCIATES, a corporation, CHARLES LUCKMAN and SAM BURNETT,	)	
Defendants and Respondents	)	

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Olson, Judge. Affirmed.

Burt Pines, City Attorney, Gary R. Netzer, Deputy City Attorney, for Respondents City of Los Angeles and C. Erwin Piper.

Adams, Duque & Hazeltine, John H. Brinsley and Richard T. Davis, Jr., for Respondents Charles Luckman Associates, Charles Luckman and Samuel M. Burnett.

Irwin M. Friedman, for Plaintiffs and Appellants.

Plaintiffs, who formerly owned property near the Los Angeles Trade Center, filed a complaint for money against the City of Los Angeles, and C. Erwin Piper, the City Administrative Officer, as well as against Charles Luckman and Associates and related defendants. The trial court dismissed the action after sustaining defendants' demurrers to plaintiffs' third amended complaint. The court also denied plaintiffs' motion for an evidentiary hearing.

FACTS

In may, 1968, defendant City filed a condemnation complaint to acquire certain parcels of property including plaintiffs' property. Plaintiffs, ad defendant in that action, answered and alleged that the property was "not needed as a 'Public necessity'" and that it was not being acquired for a public use. The parties agreed in a joint pretrial statement that the issued included whether the use to which the property was to be applied as "a use authorized by law," whether the taking was "necessary to a use authorized by law," and whether the taking would be "the most compatible with the greatest public good and the least private injury."

Plaintiffs argued in the condemnation case that the property was not necessary for a public use and would not be devoted to a public use on the theory that "the properties taken . . . for use of street widening and street opening will be and is [sic] now contemplated for resale to private developers for uses which are not public in character." The City argued, in substance, that a public purpose is not defeated because real property may be later sole to private developers.

After a trial which started on November 4, 1969, and concluded on November 13, 1969, judgment granting

the City a final order of condemnation on payment of the damages was entered on December 19, 1969.

In November 1972, plaintiffs filed the complaint in this action. They alleged, in substance, a conspiracy to prevent them from litigating the issue of public use in the prior action through the use of perjured testimony. In a second cause of action they alleged that defendant City had illegally expended gas tax funds.

DISCUSSION

Plaintiffs have apparently abandoned whatever claims they were asserting in connection with the misue of the gas tax. On appeal, their grievance is limited to the allegedly perjured testimony introduced in the condemnation trial, which, they claim, prevented them from litigating the public use issues involved in this case.

Despite an intriguing statement of the questions on appeal, 1/ plaintiffs' 47 page brief -- which incidentally does not contain any statement of facts -- never comes to grips with the decisive issue in this case. In brief, plaintiffs litigated the public use issues in the 1968 condemnation action and are estopped from relitigating them. (E.g., Bernhard v. Bank of America, 19 Cal. 2d 807, 813-814.)

1/ Plaintiffs states the questions on appeal as follows:

"I

"THE AUTHORITIES ARE UNAMIOUS THAT EXCESS CONDEMNATION IS UNCONSTITUTIONAL.

"II

"NO THEORY OF EXCESS CONDEMNATION IS APPLICABLE TO THE CASE AT BAR.

continued -

Other than to assert erroneously that Bernhard is no longer the law in the state, plaintiffs attempt to escape its effects by claiming that there is no identity of issues and in any event, the doctrines of collateral estoppel should not apply to when its invocation would result in injustice. The contentions have no merit.

First, plaintiffs' assertion that there is no identity of issues is wrong. The claim the issue in the former case was whether the City was acquiring their property for a public use, but that the issue in this case is whether defendants, by lying, are responsible for any damage they might have caused.

A comparison, however, of plaintiffs' complaint in this case with plaintiffs' pleading as defendants in the condemnation action makes clear that both cases present the issue whether the property was wrongfully condemned for public use. If defendant "lied," the lies would be relavant only because they concealed the "truth" concerning the claimed public use.

1/

"III

"PRESUMPTIONS ARE NOT A MEANS TO ESCAPE CONSTITUTIONAL RESTRICTIONS.

"IV

"NEITHER OF THE DOCTRINES OF RES JUDICATA NOR COLLATERAL ESTOPPEL ARE APPLICABLE TO THE CASE AT BENCH

"V

"THE INFIDELITY OF THE GOVERNMENT IN THE CONDEMNATION CASE DEPRIVED THE APPELLANTS OF DUE PROCESS OF LAW, WHICH DEPRIVATION CAN BE RECTIFIED BY A COLLATERAL ATTACK.

A judgment obtained by fraud may be set aside only in the case of extrinsic as opposed to intrinsic fraud or mistake. (E.g., Kulchar v. Kulchar, 1 Cal. 3d 467, 471-473.) The use of perjured testimony at a trial constitutes intrinsic rather than extrinsic fraud. (E.g., Kachig v. Boothe, 22 Cal. App 3d 626, 633.) The reason for the distinction is that perjured testimony is subject to attack at the trial and thus the litigant is not deprived of his day in court. (See Gale v. Witt, 31 Cal. 2d 362, 367) Indeed, the recond in the condemnation proceeding reflects plaintiffs' disbelief that the City's witnesses were being entirely truthful.

Specifically, several cases have held that alleged fraud, in the form of misleading or false evidence concerning the use to which the property would be put, is intrinsic and does not provide the basis for a collateral attack on the judgment. (Hamacher v. People, 214 Cal. App. 2d 180, 183; Thiriot v. Santa Clara Etc. School District, 128 Cal. App 2d 548, 550-551; Beistline v. City of San Diego (9th Cir. 1958) 256 F. 2d 421, 424, cert. den., 358 U.S. 865.)

Plaintiffs' assert that defendants were in a fiduciary relationship to them and therefore the distinction between extrinsic and intrinsic fraud does not apply. However, plaintiffs' complaint alleges no such relationship with respect to the Luckman defendants who, as best as we can tell from plaintiffs' complaint, were allegedly planning to buy the condemned site and build a hotel and trade center thereon, and, with respect to the City defendants, the role is that no fiduciary relationship exists between a governmental agency as a condemnor and a condemnee. (E.g., Hayward Union Etc. School Dist. v. Madrid, 234, Cal. App. 2d 100, 124.)

1/

"VI

"THE 'PUBLIC USE-PUBLIC NECESSITY' CONUNDRUM."

Finally, although not entirely clear, it appeals that Plaintiffs contend that through public use may have been litigated, the issue of public necessity was not. First, the record of the former action shows that plaintiffs raised the issue. More to the point, the issue of public necessity is non-justiciable even where the action of the legislative body is motivated by fraud. (People v. Chevalier, 52 Cal. 2d 299, 307; see, Code Civ. Proc., § 1241.)

Finally, plaintiffs complain that the trial court erred in not permitting them an evidentiary hearing on the subject of whether this was an appropriate case to suspend the operation of the doctrine of collateral estoppel. Their complaint was insufficient as a matter of law; an evidentiary hearing is not within the "statutory and traditional procedure for testing the sufficiency of a complaint on demurrer." (Tyree v. Epstein, 99 Cal. App. 2d 361, 364.)

In conclusion, the trial court property sustained defendants' demurrers to plaintiffs' third amended complaint. The judgment (order of dismissal) is affirmed.

NOT FOR PUBLICATION

KAUS, P. J.

We concur: ASHBY, J.

HASTINGS, J.

APPENDIX

B

Notice of the Supreme Court of the State of California denying Petitioners' Request for Certiorari.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 21 1976

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 46596

Rose

vs.

City of Los Angeles

Respectfully,

G. E. BISHEL
Clerk

EMF

B1